



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 10, 1997

Ms. Tracie L. Washington
Chief Counsel
Capital Metropolitan Transportation Authority
2910 East Fifth Street
Austin, Texas 78702

OR97-0302

Dear Ms. Washington:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 103500.

The Capital Metropolitan Transportation Authority ("Capital Metro") received a request for inspection of the "most recent report" filed by Central of Tennessee Railway & Navigation Company d/b/a Longhorn Railway Company. However Capital Metro seeks to withhold the requested information based on sections 552.101 and 552.103 of the Government Code as it states that Longhorn Railway Company regards the information to be "deemed confidential by federal law through 49 U.S.C. Section 11904."¹ You enclose the information Capital Metro seeks to withhold.

¹This provision recently subject to the "ICC Termination Act of 1995" through Pub.L. 104-88, Dec. 29, 1995, 109 Stat. 803 reads, in part, as follows:

(a) A--

(1) rail carrier providing transportation subject to the jurisdiction of the Board under this part, or an officer, agent, or employee of that rail carrier; or another person authorized to receive information from that rail carrier, that knowingly discloses to another person, except the shipper or consignee; or discloses to another person, except the shipper or consignee; or

(2) a person who solicits or knowingly receives, information described in subsection (b) without the consent of the shipper or consignee shall be fined not more than \$1,000.

(b) The information referred to in subsection (a) is information about the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to that rail carrier for transportation provided under this part, or information about the contents of a contract authorized under section 10709 of this title, that may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor, the business transactions of the shipper or consignee.

Pursuant to section 552.305 of the Government Code as invoked by Capital Metro, representatives of Longhorn Railway Company were notified of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure.² Longhorn Railway Company responded by asserting that the information requested contains confidential commercial and financial information which should be excepted from disclosure and it agreed with Capital Metro's position on the applicability of section 552.103(a) to the instant case.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Federal law may make information in the custody of governmental bodies confidential for the purposes of section 552.101. *See, e.g.*, Open Records Decision No. 541(1990), 403 (1983). Nonetheless, for information to be excepted from disclosure under 552.101, confidentiality must be expressly provided in the relevant statute and cannot be assigned by implication. *See, e.g.* Open Records Decision No. 541 (1990), 465 (1987). Parties to rail contracts cannot rely on the federal law directly regulating railroads to prevent the disclosure of all the information as the public interest in such contracts is recognized in disclosing the terms of the rail contracts. Open Records Decision No. 541 (1990) at 3.

Accordingly, the general terms of a contract with a governmental body may not properly be withheld under the Open Records Act. *See* Open Records Decision Nos. 541 (1990) at 1, 514 (1988). Thus, the information may not be withheld under section 552.101.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. Capital Metro has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Capital Metro must meet both prongs of this test for information to be excepted under section 552.103(a).

After reviewing the documents, which include the Plaintiff's Petition To Perpetuate Testimony, we conclude that there is not a reasonable anticipation of litigation to which Capital Metro or to which an officer or employee of the governmental body as a consequence of the person's office or employment may be a party. Therefore, Capital Metro may not withhold the requested documents under section 552.103.

Section 552.110 excepts from disclosure trade secrets and commercial or financial information obtained from a person and confidential by statute or judicial decision. Section 552.110 is divided into two parts: (1) trade secrets and (2) commercial or financial information, and each part must be considered separately.

²One additional individual responded with a protest directed at Capital Metro's position on its invocation of section 552.103(a) of the Government Code.

In regard to the trade secret aspect of section 552.110, this office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if a prima facie case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5; *see* Open Records Decision No. 542 (1990) (governmental body may rely on third party to show why information is excepted from disclosure). The Texas Supreme Court has adopted the definition of the term "trade secret" from the Restatement of Torts, section 757 (1939), which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list or specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

The following criteria determines if information constitutes a trade secret:

- (1) the extent to which the information is known outside [the owner's business];
- (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken [by the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be property acquired or duplicated by others.

Id.; *see also* Open Records Decision No. 522 (1989).

However, this office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). Facts sufficient to show the applicability of these factors have not been provided. *See* Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information).

We also observe that section 552.110 excepts from disclosure commercial or financial information obtained from a person and confidential by statute or judicial decision. Longhorn Railway Company argues that the requested information is protected because its disclosure would lead to competitive harm. Longhorn Railway Company invokes protection from disclosure commercial or financial information and has submitted a copy of "Plaintiff's Petition To Perpetuate Testimony" in *Central of Tennessee Railway and Navigation Company, d/b/a Longhorn Railway Company vs. Andrew K. Fish*, No. 96-13113 (D. Ct. Of Travis County, 98th Judicial D. Of Texas, Oct. 28, 1996). The petition appears to inquire into the identity or source of allegedly predatory and hostile contact of the railway's contract customers. The Longhorn Railway Company's petition evidences a serious intent to undertake steps to maintain its competitive advantage. In Open Records Decision No. 639 (1996), this office established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). We agree that the Longhorn Railway Company has established the applicability of section 552.110.

We have reviewed the documents, and conclude that, Capital Metro must withhold any information which identifies the shipper or consignee conducting business with the carrier Longhorn Railway Company as it constitutes information which comes under the second prong of section 552.110.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Janet I. Monteros', with a long horizontal line extending to the right.

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/rho

Ref.: ID# 103500

Enclosures: Submitted documents

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